



## The Latest Commentary on Affidavit Practices in NSW

**Case Note: Chen v Chu [2024] NSWSC 1139 and Wild v Meduri [2024] NSWCA 230**

### Overview

The progression of legal principles surrounding affidavit practices in NSW has taken an interesting turn, particularly in relation to how conversations are presented as evidence. While *Chen v Chu* [2024] NSWSC 1139 defended the practice of using direct speech in affidavits prefaced with phrases like “to the following effect”, the recent Court of Appeal decision in *Wild v Meduri* [2024] NSWCA 230 refines this approach. The appellate court’s latest ruling reclassifies such practices as opinion evidence, signalling an evolution in the understanding of evidentiary standards for conversations.

### Case Summary - Chen v Chu

In *Chen v Chu* [2024] NSWSC 1139, the Plaintiffs were prospective buyers (The Owners) who were induced by a real estate agent to release significant deposits as unsecured loans to a developer at a 15% interest rate. They were further persuaded to purchase multiple off-the-plan apartments, trusting the developer’s supposedly strong financial position, which was misrepresented. When the developer’s Ponzi scheme

collapsed, the plaintiffs suffered a \$7 million loss and sued the real estate agent for misleading and deceptive conduct.

The key issue in *Chen v Chu* involved misleading representations by the agent, who falsely claimed that the deposits would fund construction, that the

developer had good cash flow, and that there was no need for legal or financial advice. The court rejected the agent's defences and awarded the Owners damages of over \$7 million, ruling that the real estate agent's conduct was indeed deceptive and induced the Owners' losses.

## Affidavit Practices in *Chen v Chu*

A notable aspect of *Chen v Chu* was the court's endorsement of how conversations were recounted in affidavits. The Owners relied on the Federal Court's decision in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381, where the practice of using phrases like "to the following effect" when recounting conversations was criticised. However, Hammerschlag CJ disagreed with this critique. He upheld the practice, noting that such prefatory language allows witnesses to convey the gist of a conversation, signalling to the fact-finder that the witness is recounting their best recollection rather than quoting verbatim.

This approach aimed to balance clarity and credibility, allowing for cross-examination to test the accuracy of these recollections. The ruling provided some reassurance to practitioners, confirming that recounting conversations with this approach was acceptable in NSW courts.

## The Evolution of Affidavit Practices – *Wild v Meduri*

The debate over the use of 'direct speech' in affidavits continues to unfold in the courts. Jackman J of the Federal Court has been notably critical of the practice of recounting conversations in affidavits using direct speech, even when witnesses only recall the general

effect of the conversation. In *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381, Jackman J described this practice as 'logically, ethically and grammatically wrong' and challenged its use when only the gist of a conversation is remembered. Building on this critique, the NSW Court of Appeal in *Gan v Xie* [2023] NSWCA 163 saw White JA endorsing Jackman J's reasoning in obiter.

Emboldened by these views, Jackman J further elaborated in *Chu v Lin in the matter of Gold Stone Capital Pty Ltd (Trial Judgment)* [2024] FCA 766, where he held that presenting conversations in direct speech in affidavits, when the witness could only recall the general substance, could adversely affect the witness's credibility.

However, the NSW Court of Appeal took a different approach in the more recent case of *Wild v Meduri* [2024] NSWCA 230. In this case, Bell CJ, supported by Kirk JA, strongly criticised Jackman J's stance. Bell CJ, at [248], stated that it was 'both unorthodox and undesirable for a single judge of any court to unilaterally arrogate to him or herself the "ending [of a] longstanding practice in New South Wales" (or any other jurisdiction)'. His Honour undertook a robust defence of the long-standing practice of using phrases like 'to the following effect' when recounting conversations in affidavits, noting that this approach allows witnesses to convey the gist of conversations, which can then be tested under cross-examination.

Kirk JA, concurring with Bell CJ, acknowledged that there is a spectrum of how witnesses recall conversations. He explained that some witnesses may remember the exact words, while others may only recall the general effect or topics of a conversation. Kirk JA

suggested that witnesses should not be required to use direct speech if they only remember the substance of a conversation, and using prefatory phrases like ‘to the following effect’ remains appropriate when recounting the gist.

In contrast, White JA did not explicitly criticise Jackman J’s position, as outlined in *Gan v Xie*, and largely reserved comment in *Wild v Meduri*. His Honour reiterated that when a witness claims to recall the exact words of a conversation, this constitutes factual evidence. However, if the witness can only recall the effect of a conversation, such recollection should be classified as opinion evidence, subject to the admissibility rules for opinion testimony. Despite his comments, White JA acknowledged that his observations were obiter and not binding. The Court awarded \$7,438,548 in damages to the Owners, finding the real estate agent liable for misleading and deceptive conduct. The Court also ordered the Real Estate Agent to pay the Owners’ costs, subject to further submissions.

## Key Takeaways for Practitioners

The decision in *Wild v Meduri* underscores the divergent views on affidavit drafting, particularly when recounting conversations. While Bell CJ and Kirk JA defended the long-standing practice of using indirect speech with qualifying phrases, White JA’s dissent signals that the debate is far from settled. For practitioners, the safest approach may be to avoid using direct speech in affidavits where witnesses only recall the substance of a conversation, particularly if appearing before judges like Jackman J, who have expressed strong opposition to the practice.

## Conclusion

The ongoing debate between the Federal Court and the NSW Court of Appeal reveals the complexity of affidavit drafting, especially concerning how conversations are presented. While *Wild v Meduri* maintains the permissibility of indirect speech in affidavits, it also highlights the risk that certain judges may take an adverse view of the practice. Until clearer, binding guidance is provided, practitioners should remain cautious and ensure that affidavits reflect either factual recollections or properly classified opinion evidence.

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